

**FLATHEAD COUNTY PLANNING AND ZONING OFFICE**  
**ZONING VARIANCE REPORT (#FZV-12-03)**  
**MCKNIGHT**  
**DECEMBER 24, 2012**

A report to the Flathead County Board of Adjustment regarding a request by Fred McKnight, with technical assistance by Mark Buckwalter for a variance to Section 3.10.040(3)(A) "Bulk and Dimensional Requirements," requiring structures to have a minimum front yard setback of 20 feet from the property line. The variance requested would apply to the property located at 357 Caroline Point Road, near Lakeside, MT. The property is located within the Caroline Point zoning district.

The Flathead County Board of Adjustment will hold a public hearing on the variance request on January 8<sup>th</sup>, 2013 beginning at 6:00 P.M. in the 2<sup>nd</sup> floor conference room of the Earl Bennett Building, 1035 First Avenue West, Kalispell. Documents pertaining to this application are available for public inspection at the Flathead County Planning and Zoning Office, also located on the second floor of the Earl Bennett Building.

**I. APPLICATION REVIEW UPDATES**

**A. Land Use Advisory Committee/Council**

The proposed variance is located within the Lakeside Community Council's jurisdiction. Normally the Council meets on the last Tuesday of each month. However, in December the last Tuesday of the month is the 25<sup>th</sup> which is a County holiday. Therefore, the Council decided to move the regular meeting ahead one week to December 18<sup>th</sup>.

On December 18, 2012 the Lakeside Community Council met to discuss the proposed variance. Planning Director BJ Grieve presented some context on the history of the property and the expansion of the structure that was reviewed and permitted in 2010. (See explanation in Section E. of this report for details.) Following the brief explanation, staff reviewed each of the criteria required for approval of a variance found in Section 2.05.030 FCZR and explained in detail how the proposed deck met or did not meet each of the criteria. Following staff's presentation, the applicant was given time to present, however they stated they had no comment at this time. Then the meeting was opened up for public comment on the proposed variance. Only one member of the public spoke, requesting to know the overall width of the dedicated County road. Following public comment the meeting was opened up for Board discussion. The Council members discussed the possibility of removing the portion of the deck over the property line but allowing the applicant to leave the portion which is an expansion of the non-conforming structure. Additional discussion followed regarding the applicant having knowledge of the regulations in 2010. A motion was made by Barb Miller, seconded by Mike Wilson, to recommend against the approval of the variance request. The Council started to call a vote; however, one member of the Council was still undecided so it was retracted. More discussion was held, followed by the final vote. The motion passed 3-1.

## **B. Board of Adjustment**

The Flathead County Board of Adjustment will hold a public hearing on January 8<sup>th</sup>, 2013. This section will be updated following the meeting.

## **II. GENERAL INFORMATION**

### **A. Application Personnel**

#### **i. Applicant/Landowner**

Fred McKnight  
P.O. Box 1154  
Lakeside, MT 59922  
(602) 577-3054

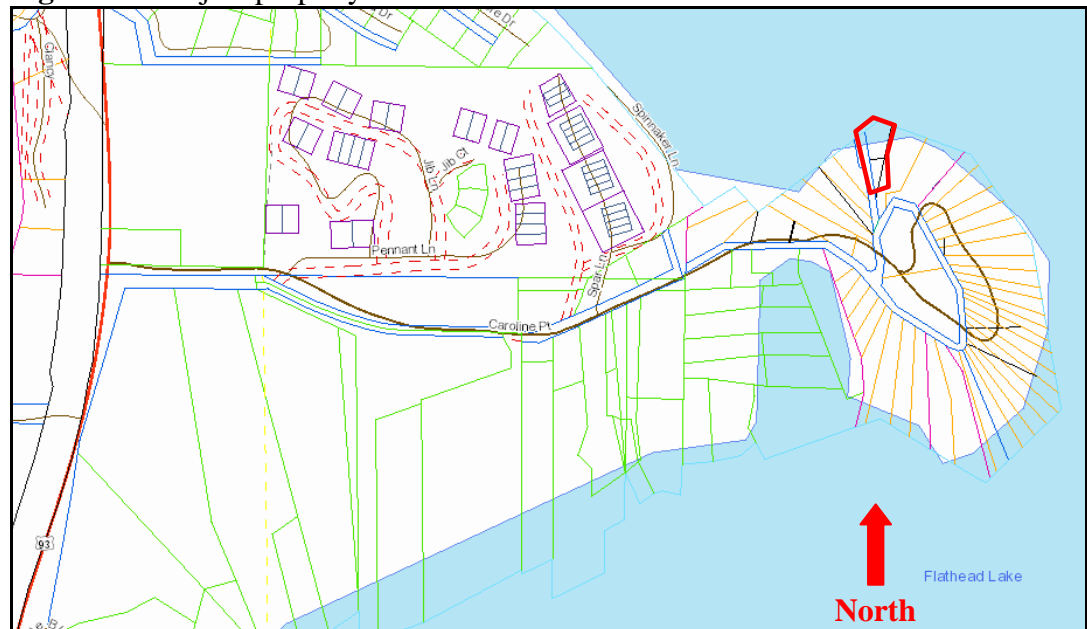
#### **ii. Technical/Professional Assistance**

Mark Buckwalter  
Buckwalter Law Firm, PLLC  
100 Financial Drive, Suite 200  
Kalispell, MT 59901  
(406) 257-1170  
[mark@buckwalterlawfirm.com](mailto:mark@buckwalterlawfirm.com)

### **B. Property Location**

The subject property is located approximately 1.5 miles north of Lakeside at 357 Caroline Point Road, approximately 0.5 miles from the intersection of Caroline Point Road and US Highway 93 (see Figure 1 below). The property can be legally described as Lots 6A-TR1, 6A-TR2, 6B-TR1 and 6B-TR2 of Whipps Point Caroline Villa Sites Subdivision, located in Section 6, Township 26 North, Range 20 West, P.M.M., Flathead County, Montana.

**Figure 1:** Subject property outlined in red.



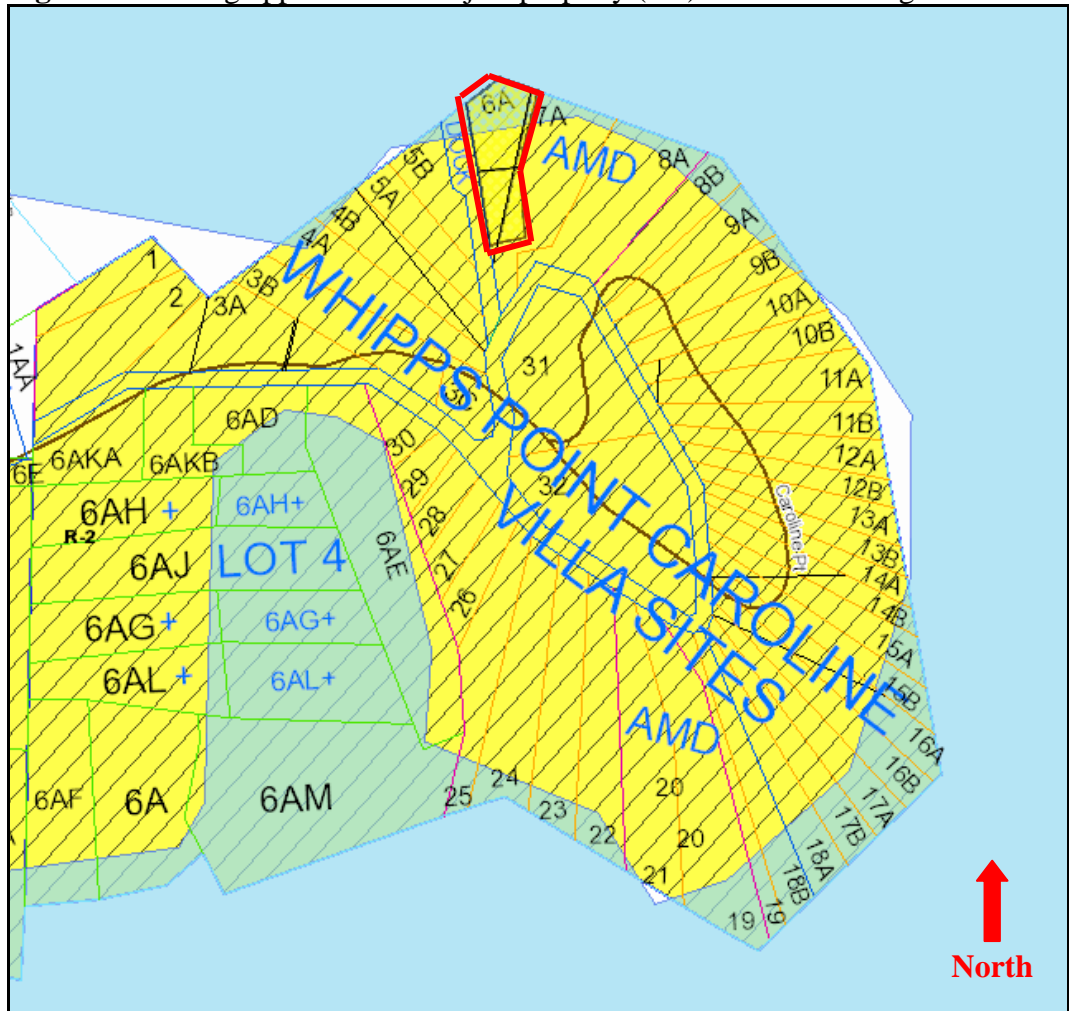
### C. Existing Land Use(s) and Zoning

The subject property is located within the Caroline Point zoning district adopted January 21, 1987 and is currently zoned “R-2 One Family Limited Residential”, a district intended “*to provide for large-tract residential development. These areas will typically be found in suburban areas, generally served by either sewer or water lines.*” [Flathead County Zoning Regulations, Section 3.10.010] The subject property is approximately 0.39 acres, and is currently developed with a single-family residential home.

#### **D. Adjacent Land Use(s) and Zoning**

As shown by Figure 2 below, parcels immediately surrounding the subject property are also zoned “R-2 One Family Limited Residential.” The area surrounding the subject property is primarily residential in nature, with lots ranging between approximately 0.1 and 0.8 acres in size. The majority of the property owners in the surrounding area own several adjacent parcels in order to construct their residential homes.

**Figure 2:** Zoning applicable to subject property (red) and surrounding area.



#### **E. Summary of Request**

The applicant is requesting a variance to Section 3.10.040(3)(A) of the Flathead County Zoning Regulations (FCZR) regarding “Bulk and Dimensional Requirements” for property located within the “R-2 One Family Limited Residential” zone. This section of the regulations requires principal structures to have a minimum setback of 20 feet from the front property line. The applicant is requesting a variance to this section to reduce the required setback to 0 feet, in order for a newly constructed deck to be compliant with the zoning regulations. According to the Computer Assisted Mass Appraisal (CAMA) report maintained by the Montana Department of Revenue, the existing residential structure was constructed in 1930 and is considered a non-conforming structure. The structure was built directly on the front property line, and the existing chimney actually extends over the front property line. In 2010 a violation complaint was submitted to the Flathead County Planning and Zoning Office alleging that the applicant was expanding the existing structure further into the setback. According to Section 2.07.040(3) of the Flathead County Zoning Regulations, *“a building or structure conforming with respect to use but non-conforming with respect to height, setback, or lot coverage may be altered or extended if the alteration or extension does not further deviate from these regulations.”* It was determined in 2010 that the applicant was extending the residential structure within the footprint of an existing deck, which was over three feet in height. ‘Structure’ is defined in the zoning regulations as *“a combination of materials constructed and erected permanently on the ground or attached to something having a permanent location on the ground including buildings and signs. Not included are residential fences less than six feet in height, retaining walls, rockeries and similar improvements of a minor character less than three feet in height.”* [Section 7.18.200 FCZR] Therefore, the deck in 2010 was considered part of the existing structure, and constructing a permanent foundation with enclosed walls within the legal non-conforming deck footprint was not a violation of zoning. The file was closed on August 10, 2010.

Prior to the file being closed, a Zoning Administrator Interpretation was written on April 19, 2010 indicating that the conversion of the deck into internal home-space was permitted as it did not further deviate from the regulations. Also discussed within the Zoning Administrator Interpretation was that the applicant had proposed a *new* deck which would include portions constructed within the established setback. The applicant was informed at that time both verbally and in writing that a new proposed deck within the required setbacks would not be allowed as it would be a further deviation from the setback requirements of the regulations. On May 13, 2010 the applicant and his technical representative Marc Liechti, appeared before the Flathead County Board of Commissioners looking for guidance on resolving an issue related to the dedicated road adjacent to the subject property, and extending the proposed deck. Mr. Liechti stated a deck would not encroach anymore across the property line than it did before and that they were informed they could apply for a variance if they wanted to build the deck. BJ Grieve, the Assistant Planning Director at that time, explained that the applicant was notified that applying for a variance was an option, as it is for any

citizen who feels the regulations are burdensome; however, a variance can only be supported if during the review it is determined that a denial of reasonable use of the property exists due to the imposition of the regulation. Additionally, on May 14, 2010, Mr. Grieve emailed a reply to Mr. Liechti's inquiry regarding clarification of the applicant's property setbacks. In the email, it was explained that the applicant's lot is an 'interior lot' per Section 7.12.080 FCZR, and that since the dedicated County road adjacent to the subject property is considered a road, the 'front' of the lot is the west property line per Section 7.12.070 FCZR. Therefore, the setbacks would be 20 feet from the road (west property line), 10 feet from the sides (south and north property lines), and 20 feet from the rear (east property line).

On October 22, 2012 it was brought to staff's attention by a zoning violation complaint that the applicant was constructing a new 'L' shaped deck addition greater than 3 feet in height onto the already expanded structure. The addition extends further into the front setback and over the property line along the west side of the existing residential structure approximately 4 ½ feet wide by 28 feet long. The deck along the north side of the house is approximately 11 feet wide by 37 ½ feet long. The total square footage of the deck is approximately 538.5 square feet. In addition, the northwestern corner of the deck is approximately 26 feet from the high water mark of Flathead Lake and the northeastern corner is approximately 15 feet from the high water mark of Flathead Lake. Based on staff's measurements, the northeastern corner of the deck has been constructed within the 20 foot Lakeshore Protection Zone, and is therefore not in compliance with the setback required from Flathead Lake. As previously stated, since the deck addition is located more than 3 feet in height, it is considered part of the structure per Section 7.18.200 FCZR and must comply with all setback requirements of the R-2 zoning. The applicant was issued a stop work order on October 31, 2012. Later that afternoon the applicant met with staff to discuss the violation and was told to remove the portion of the structure in violation. At this time, the applicant has decided to first pursue a zoning variance in order to resolve the apparent zoning violation and bring the newly constructed deck into compliance with the R-2 zoning regulations. While the applicant's submitted application only references Section 3.10.040(3)(A) FCZR requiring principal structures to have a minimum setback of 20 feet from the front property line, the new constructed deck would also require a variance to Section 2.07.040(3) FCZR because the extension further deviates from the regulations, and a variance to Section 2.07.010 FCZR because the original structure had been established over the western property line and the applicant is proposing the extent of the non-conforming use to be further expanded. If the Board of Adjustment grants the request for a variance to allow the deck, reference would also need to be made to the two additional sections of the zoning regulations.

#### **F. Compliance with Public Notice Requirements**

Notification was mailed to adjacent property owners within 150 feet of the subject property on December 10<sup>th</sup>, 2012, pursuant to Section 2.05.030(2) of the Zoning

Regulations. Legal notice of the public hearing on this application will be published in the December 23<sup>rd</sup>, 2012 edition of the Daily Interlake.

#### **G. Agency Referrals**

Agency referrals were sent to agencies listed below regarding the variance request.

- Wendee Jacobs, Flathead City-County Environmental Health Department
  - Reason: The property is located within the department's jurisdiction, and may require approval by their office.
- Joe Russell, Flathead City-County Environmental Health Department
  - Reason: The property is located within the department's jurisdiction, and may require approval by their office.
- Dave Prunty, Flathead County Public Works Department
  - Reason: The property is accessed from a public roadway, and is adjacent to a dedicated County road.
- Somers Fire Department
  - Reason: The property is located within the Fire District, and has the potential to impact their facilities.
- Lakeside County Water & Sewer District
  - Reason: The property is located within the department's jurisdictions, adjacent to a recorded easement with a lift station, and has the potential to impact their facilities.
- Marc Pitman, Department of Natural Resources and Conservation
  - Reason: The property is located adjacent to Flathead Lake, and has the potential to impact water resources.

### **III. COMMENTS RECEIVED**

#### **A. Public Comments**

No written public comments have been received to date regarding the variance request. It is anticipated any individual wishing to provide public comment on the application will do so during the public hearing at the Board of Adjustment meeting scheduled for January 8<sup>th</sup>, 2013.

#### **B. Agency Comments**

Comment was received from the following agencies.

- Wendee Jacobs, Flathead City-County Environmental Health Department
  - Comment: No comments to forward regarding the zoning variance.
- Dave Prunty, Flathead County Public Works Department
  - Comment: After our review we have determined that Mr. McKnight did not apply nor received an encroachment permit from our office to perform work in a County right-of-way. We also understand there is an outstanding zoning violation for this property and that we would not issue an encroachment permit when such an issue exists.
- Rodney Olson, Lakeside County Water and Sewer District
  - Comment: We do have a sewer lift station in close proximity to the

new deck, we feel as though we will continue to have plenty of access if need be. I see no need to stop this from going forward on our part.

#### **IV. CRITERIA REQUIRED FOR CONSIDERATION**

Per Section 2.05.030 of the Flathead County Zoning Regulations, what follows are review criteria for consideration of a variance request, as well as suggested findings of fact based on review of each criterion. It should be noted Section 2.05.030 of the Flathead County Zoning Regulations states “No variance shall be granted unless the Board (of Adjustment) finds that all of the following conditions are met or found to be not pertinent to the particular case”:

##### **A. Strict compliance with the provisions of these regulations will:**

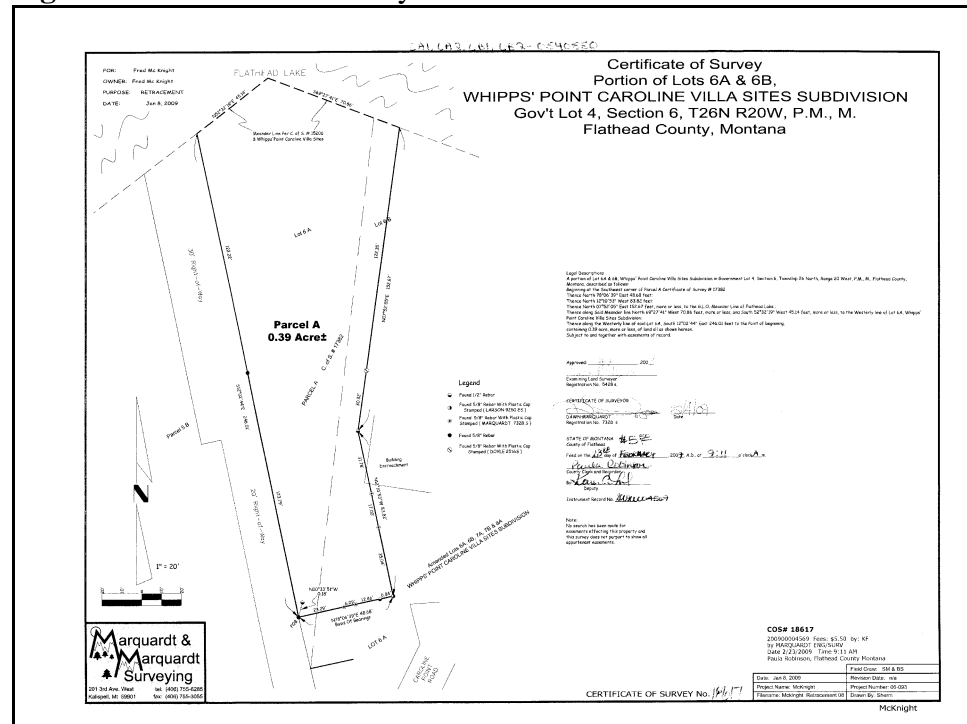
###### **i. Limit the reasonable use of property;**

The applicant currently owns four adjacent properties, Lots 6A-TR1, 6A-TR2, 6B-TR1 and 6B-TR2 of Whipps Point Caroline Villa Sites Subdivision. Staff contacted the Flathead County Plat Room and determined that the four parcels do not have separate legal descriptions and at this time they must be conveyed together. This means that the tracts cannot be sold individually. According to the Flathead County Zoning Regulations (FCZR), “*where two or more lots are used as a building site and where main buildings cross lot lines, then the entire area shall be considered as one lot....*” [Section 5.08.010(1) FCZR] As shown in Figure 3 below, Certificate of Survey #18617 shows the property as one tract, and does not separate out the four parcels individually since they must convey together.

Within the R-2 zoning, a single-family dwelling is a permitted use. Therefore, the applicant already has a reasonable use of the property with the existing non-conforming single-family home. In 2010 the applicant was able to expand the structure to enclose the existing non-conforming deck because the deck was over three feet in height and considered part of the non-conforming structure. The application submitted for the variance request states that strict compliance with the setback requirements would limit the reasonable use of the property because the applicant would not be able to access the lake from the north side of the house and the door on the north side will lead to a drop off of approximately 10 feet. However, currently there is an existing access on the north side of the structure located below the newly constructed deck as shown in Figures 4 and 5. Additionally, when the applicant enclosed the previous deck in 2010, they were informed that they could not build another deck off the second story within the 20 foot setback, but that a deck outside of the established setback would be possible. At that time, the applicant could have constructed a doorway on the west or east side of the building granting additional access out of the structure, or moved the proposed doorway on the north side of the second story further eastward to grant access outside of the established setback. Based on the property topography, there is no

reason why a door may *only* be constructed on the north side of the house. Therefore, the applicant is not being denied a reasonable use of the property as there are other ways to access the lake from the existing structure which would not encroach further into the setback. Furthermore, the applicant constructed a stairway on the east side of the residential structure which is compliant with the zoning, providing access to the waterfront from the deck. (See the left side of Figure 5.)

**Figure 3: Certificate of Survey #18617 on file with the Plat Room.**





**Figure 4:** Existing doorways on the north side of the structure.



**Figure 5:** Existing doorway on the north side below the new deck.



**Finding #1** - Strict compliance with the regulations would not limit the reasonable use of property because the existing residential home is a permitted use within the R-2 zoning, there is already an existing access on

the north side of the structure located below the newly constructed deck granting access to the lake, the applicant could have constructed a doorway on the east or west side of the structure in 2010 to establish other access points to the lake which would not encroach further into the setbacks, and the applicant could have constructed a smaller deck outside of the 20 foot setback accessing the east half of the second story and was informed of this in 2010 prior to the construction of the new deck.

**ii. Deprive the applicant of rights enjoyed by other properties similarly situated in the same district.**

The neighborhood in which the subject property is located is predominantly residential. The R-2 zoning establishes single-family dwellings as a permitted use within the district. The existing single family residence is considered non-conforming with respect to setbacks because it was constructed prior to the establishment of the Caroline Point Zoning District on January 21, 1987. In 2010 the applicant was permitted to expand the structure to enclose the existing non-conforming deck. This was permitted because the previous deck was over 3 feet in height and therefore considered part of the existing non-conforming structure. As long as the deck was not further expanded, the structure was not in violation. The definition of ‘setback’ states that it is the distance between the property line and the building line. [Section 7.18.045 FCZR] ‘Building line’ is defined as *“that part of the building nearest the property line including building corners, faces, covered decks or porches and decks over three feet in height.”* [Section 7.03.100 FCZR] Therefore, if a deck structure is less than 3 feet in height and it is uncovered, it does not have to comply with the setback requirements of the R-2 zoning. Many of the adjacent properties are approximately the same size as the subject property and have constructed single family dwellings. Some of the structures have decks or porches both covered and uncovered. However, staff is not able to enter the properties to determine if they are compliant with the R-2 setbacks. Additionally, as with the applicant’s structure, they may also be non-conforming structures and do not have to comply with the R-2 setbacks. As a result, strict compliance with the R-2 zoning would not deprive the applicant of rights enjoyed by other adjacent properties because the applicant could construct an uncovered deck or porch less than 3 feet in height, attached to the lower level of existing structure (see Figure 5 above), which would be in compliance with the zoning regulations. Additionally, the applicant could construct a deck over 3 feet in height if it was located outside of the 20 foot setback, and would therefore only access the eastern half of the second story. Staff has not been able to determine any specific reason why the deck must further encroach over the adjacent property line onto the dedicated County road. As stated previous, there does not appear to be any topography related issues which require access only from the stairway over the dedicated roadway. Technically, the applicant’s actual front door is located on the

southern side of the house, well away from the roadway. Also, it does not appear that any of the surrounding structures are located over the property line and onto the dedicated County road. Therefore, the applicant is not being denied a right enjoyed by other surrounding property owners along the dedicated County road.

**Finding #2** - Strict compliance with the regulations would not deprive the applicant of rights enjoyed by other properties similarly situated in the same district because single-family residences are a permitted use within the R-2 zoning, the applicant could have constructed an uncovered deck less than 3 feet in height from the ground floor which would not have to be compliant with the zoning regulations, the applicant could have constructed a deck over 3 feet in height if it was located further to the east along the north side of the structure outside of the 20 foot setback, and there are no apparent topography issues which require access to the structure only from the stairway encroaching into the dedicated County road.

**B. The hardship is the result of lot size, shape, topography, or other circumstances over which the applicant has no control.**

The subject property is approximately 0.39 acres per Certificate of Survey #18617. The original subdivision which created the lots was filed in 1925. According to the Computer Assisted Mass Appraisal (CAMA) report, the residential structure was originally constructed in 1930, prior to the adoption of the Caroline Point Zoning District on January 21, 1987. When it was originally built, the structure was placed directly on the western property line. The existing chimney is actually located over the property line onto the adjacent dedicated County road. (See Figure 6 below) Therefore, the residential structure is considered non-conforming with regards to setbacks under Section 2.07 of the Flathead County Zoning Regulations and *“may continue in the manner and to the extent that it existed or water being used at the time of adoption of these regulations.”* [Section 2.07.010 FCZR] In 2010 the applicant enclosed the non-conforming deck structure, increasing the actual residential space. At that time, the applicant was informed that an additional deck could not be constructed within the 20 foot front setback because it would be an expansion of a non-conforming structure which is not permitted under Section 2.07.040(3) which states, *“a building or structure conforming with respect to use but non-conforming with respect to height, setback, or lot coverage may be altered or extended if the alteration or extension does not further deviate from these regulations.”* Additionally, since the non-conforming structure was already built directly on the property line and had a 0 foot setback, the applicant could not construct a new deck on the west side of the structure because it would be expanding over the property line onto a property not owned by the applicant, and therefore would be a change in the location of the non-conforming use. The submitted application indicates the hardship is the result of the lot’s size and the location of the existing structure in relation to the property line, both of which the

applicant had no control over. While the applicant did not own the property when the lot was created or the residential structure was originally built, they were the owner during the previously permitted expansion. Furthermore in 2010, they were aware that a new constructed deck would not be permitted as it is an expansion of the non-conforming use further deviating from the regulations, and were informed of this verbally, in writing, and in front of the County Commissioners at a meeting on May 13, 2010. Therefore the hardship has been created by the applicant, and is not the result of circumstances the applicant had no control over.

**Figure 6:** Location of existing non-conforming chimney and deck extension over the western property line (facing north).



**Finding #3** – Although the applicant was not the owner of the property when the lot or residential structure was originally created, the hardship being claimed in the submitted application is not the result of circumstances which the applicant had no control over because it was created by the applicant as they enclosed the original deck in 2010 and were informed verbally, in writing, and in front of the

County Commissioners that a new constructed deck would not be permitted under the zoning in place.

**C. The hardship is peculiar to the property.**

The majority of the tracts along Caroline Point Road are similarly sized as the subject property, and range between approximately 0.1 and 0.8 acres in size. The applicant's property is approximately 0.3 acres, and is therefore typical of the buildable lots in the surrounding area. The existing residential structure was built prior to the creation of the Caroline Point Zoning District and was constructed directly on the western property line or front property line. Therefore it is a non-conforming structure with respect to the applicable R-2 front setbacks and may continue in the location and extend to which it was constructed per Section 2.07.010 FCZR. Many of the structures built on adjacent properties were also constructed prior to the creation of the zoning district. The CAMA data available for adjacent properties both east and west establish building construction dates between 1938 and 1950. Additionally, many of the properties also list decks or porches as additional building enhancements. In 2010 the applicant enclosed the previous non-conforming deck as it met the definition of structure found in the zoning regulations since it was over 3 feet in height. At that time, the applicant was informed that the non-conforming structure was a permitted use however it could not be expanded to further deviate from the regulations per Section 2.07.040(3) FCZR. Although the applicant is not permitted to construct a deck on the west side of the structure (front property line), the definition of structure only pertains to covered decks and decks over three feet in height. Therefore, the applicant could construct a deck on the north side of the residence which is less than three feet in height and uncovered, which would not be required to comply with the setbacks found in the R-2 zoning. However, since the applicant built the new deck onto the residential structure within the front setback and over the property line, they created the hardship, and it is not peculiar to the individual property. Additionally the applicant claims if the deck were to be removed they would not have any entry points on the north side of the structure facilitating direct access to the lake. However this is not peculiar to the property as the applicant could exit any other door already existing and walk around the structure to access the lake, use the ground level door shown in Figures 4 and 5, or utilize the stairway on the east side of the deck which is outside of the required setbacks. As shown in Figures 7 and 8 below, there are no topography issues which create a hardship for the applicant to exit from another doorway and walk around the structure to access the lake. Additionally there does not appear to be any reason why the applicant must only access the deck from the stairway and walkway constructed over the property line onto the dedicated County road (see Figure 7).



**Figure 7:** View of the west property line at the corner of the deck, facing south.



**Figure 8:** View of the side property line from the deck corner, facing northeast.



**Finding #4** – The hardship claimed by the applicant is not the result of a unique or peculiar situation on the applicant's property because adjacent properties are similarly sized, the applicant could construct a deck on the north side of the residence less than 3 feet in height and uncovered so as to not meet the definition of structure, the applicant created the hardship themselves by constructing the deck over the property line even after they were informed it was not permitted, and there are no topography issues on the property which limit the applicant from accessing the lake from a different entry point on the residential structure or requiring the deck to include a walkway and stairs encroaching over the established property line with the dedicated County road.

**D. The hardship was not created by the applicant.**

As discussed under Criteria IV.A, IV.B, and IV.C above, the applicant constructed the new deck addition onto the existing residence extending the structure further into the front setback, and over the western property line. The residential structure was originally constructed in 1930 prior to the applicant owning the property, and before the Caroline Point zoning district was adopted. However, in 2010 when the applicant was enclosing the original non-conforming deck into part of the residential structure, the R-2 zoning had been adopted and there were established setbacks for the property. The applicant was informed at that time that an additional deck could not be constructed on the newly expanded residence within the front setback because it would further deviate from the regulations and is therefore not a permitted change to a non-conforming structure as outlined under Section 2.07.040(3) FCZR. Therefore, when the applicant constructed the recent deck addition they created the hardship themselves by further extending the deck within the front setbacks and over the western property line, deviating from the established location and extent of the original non-conforming structure. The applicant has stated in the submitted application that if the deck is not permitted they will not be able to access the lake from the north side of the residence and the door on the north side would lead to a 10 foot drop. However, when the applicant was enclosing the original deck in 2010, they could have moved the door to either the east or west side of the structure to facilitate a new access point. Since the applicant chose to keep the door on the north side with a 10 foot drop, they created their own problem. Based on staff's site visit, it appears there is some space on the subject property for the applicant to construct a deck or patio onto the northern side of the residence; however to maintain compliance with the established zoning, the deck would need to be less than 3 feet in height and uncovered, or be constructed outside of the required setbacks. Any deck constructed by the applicant would need to be located outside of the Lakeshore Protection Zone, or a Lakeshore Construction Permit and/or Variance for the extension into the area would be required. Staff also has found no evidence as to why the walkway and stairway accessing the new deck must encroach over the western property line onto the dedicated County road. Therefore, the encroachment was created by the applicant and there is no recognized hardship.

**Finding #5** – The hardship claimed by the applicant was created by the applicant because the addition was constructed onto the residential structure after the Caroline Point zoning district had been adopted, the applicant had been informed in 2010 that a new deck could not be constructed because it would further deviate from the regulations, and the applicant established the door on the north side of the residence within the 2010 addition creating the 10 foot drop, after being informed a new deck would not be permitted.

**E. The hardship is not economic (when a reasonable or viable alternative exists).**

Since the applicant created the hardship when they constructed the deck recently, the basis for the variance does appear to be economic. The applicant is requesting the variance in order for the new deck to come into compliance. However, as previously stated in the above sections, the original structure was non-conforming with respect to the front setback and to its location on the property as well as over the western property line. In 2010 when the applicant was enclosing the old deck, the Planning and Zoning office informed the applicant that a new deck structure could not be constructed within the 20 foot setback as it would violate Section 2.07.040(3) FCZR by further deviating from the regulations. At that time, the applicant could have reconfigured the existing access points within the new enclosed area, moving the doorway from the north side of the structure to either the east or west. Furthermore, the applicant could have constructed the deck on the second story of the structure outside of the 20 foot setback. Also, the applicant constructed the new deck over the western property line onto the adjacent dedicated County road further expanding the established location of the non-conforming structure. If the applicant wished to come into compliance, they could remove the portion of the deck which is within the front setback and over the property line, or remodel the deck so that it is within the established property lines, less than 3 feet high and uncovered. If the deck was less than 3 feet in height it would not be considered part of the structure, and therefore not have to comply with R-2 setbacks. This would require some structural reconfiguration and may be economically burdensome, but it is possible to be completed, and it could have been constructed this way to begin with.

**Finding #6** – The hardship claimed by the applicant does appear to be economic because the applicant is requesting the variance to bring the deck into compliance when they constructed the new deck onto the structure; when the applicant enclosed the original deck area in 2010 the northern doorway could have been moved to allow different access points on either the east or west sides of the structure; and the applicant could remove the portion of the deck built within the front setback and over the property line.

**F. Granting the variance will not adversely affect the neighboring properties or the public.**

The proposed variance has the potential to affect the western adjacent property owner. While the proposed variance is to bring the newly constructed deck into compliance with the R-2 zoning, the existing non-conforming residential structure



is currently located directly on the western property line within the front setback. This makes the newly constructed deck extend over the property line onto the adjacent dedicated County road, by approximately 4 feet. Since the new deck is greater than 3 feet in height, it is considered part of the structure and must comply with setbacks outlined in the R-2 zoning. Therefore, if the variance is approved, the residential structure would be permitted to be directly adjacent to the western property line, with a 'zero lot line,' and actually extend over onto an adjacent owner's property. Comment was received from the Flathead County Road and Bridge Department stating that the applicant did not apply nor receive an encroachment permit from their office to perform work on the County property. They also indicate that they are aware there is an outstanding zoning violation for this property and that they would not issue an encroachment permit when such an issue exists. The dedicated County road is approximately 20 feet wide until it reaches the corner of the original grandfathered structure. Then the road widens to approximately 30 feet and continues at that width until it intersects with Flathead Lake. Therefore, the new deck addition extends into the dedicated County road approximately 4 feet wide by 28 feet long, for a total of approximately 112 square feet. (See Figure 9 below) By granting the variance, the applicant would be permitted to expand the location and extent to which the original structure was constructed as described in Section 2.07.010 FCZR. While the new deck is only approximately 4 feet wide, it has the potential to affect an existing Lakeside Sewer and Water lift station and connected 20 foot easement within the dedicated County Road. However, comment was received from the Lakeside Water and Sewer District indicating they believe they will continue to have adequate access if the variance is granted. The majority of the dedicated County road is covered in gravel, however, the road changes to grass near the southwestern corner of the newly constructed deck. Therefore, it does not appear the deck would greatly restrict the ability for public citizens to reach the lake. However, the deck extension does make it more awkward for public citizens to distinguish the actual location of the County property.

**Figure 9:** Extension of the new deck within the dedicated County road, and the location of the existing lift station.



**Finding #7** – While granting of the variance request has the potential to create a significant impact on the neighboring property and the public, at this time it does not appear the impact would be negative because comment from the Flathead County Road and Bridge Department only indicates that the applicant did not receive an encroachment permit and that a permit cannot be issued if a zoning violation exists on the property, comment received from the Lakeside Water and Sewer District states they feel they will continue to have adequate access, and it does not appear that the deck addition would limit the ability for the public to access the lake even though it may make it confusing for citizens to distinguish the actual location of the County property.

**G. The variance requested is the minimum variance which will alleviate the hardship.**

As discussed in previous sections, the applicant constructed the new deck extension onto the existing residential structure, over the western property line, directly in violation of the R-2 zoning [Section 3.10.040(3)(A) FCZR], Section 2.07.010 FCZR, and Section 2.07.040(3) FCZR. Now, the applicant is requesting a variance to bring the deck into compliance with the regulations. The variance requests a setback of 0 feet to establish a ‘zero lot line’ with the adjacent property, and to permit the deck to extend over the western property line onto the adjacent dedicated County road approximately 4 feet. Therefore, the minimum variance needed in order to alleviate the setback problem would be a variance of 20 feet from the front

property line, plus granting permission to construct over the property line onto the adjacent owner's property. However, the applicant does have the alternative of demolishing the new deck, which was knowingly built out of compliance with the zoning (see letter of April 19, 2010 and Commissioners' minutes of May 13, 2010), and re-establish the residential structure to its non-conforming grandfathered status as it was permitted in 2010. At that time, the applicant had the ability to re-configure the previous access points to establish new ingress/egress areas on either the east or west sides of the residential structure, in conformance with the zoning regulations, or construct the deck on the north side of the structure further eastward outside of the 20 foot setback. Therefore the applicant does not appear to have a valid hardship.

**Finding #8** – While the variance requested is the only variance which would alleviate the hardship claimed by the applicant, there is no hardship because other alternatives exist to remedy the setback violation including removing the new deck to revert the residential structure back to the non-conforming status established in 2010, re-configuring the previously enclosed area to establish ingress/egress areas in compliance with the zoning regulations, or construct the deck on the north side of the structure outside of the required 20 foot setbacks.

**H. Granting the variance will not confer a special privilege that is denied other similar properties in the same district.**

Granting the requested variance will confer a special privilege for the applicant that other properties in the district are denied because it would permit the applicant to expand the non-conforming structure within the established front setbacks and over the front property line onto a different owner's property. The residential structure was originally built around 1930 and constructed directly on the western property line. As previously stated, in 2010 the applicant enclosed the previous non-conforming deck into additional living space in the non-conforming residential structure. At that time, the applicant was informed by Planning and Zoning staff both verbally and in writing that a new deck could not be constructed within the setbacks because it would further deviate from the regulations as established in Section 2.07.040(3) FCZR. Recently it was brought to staff's attention that the applicant had constructed the new deck in violation of the zoning regulations, and that the deck extended over the front property line into an adjacent dedicated County road by approximately 4 feet. While Flathead County does not have a building department, it is the individual property owner's responsibility to comply with all local regulations including zoning, and to respect all established property lines. It is important to note that, in this case the adjacent property is an actual dedicated County road owned by Flathead County located in the Whipps Point Caroline Villa Sites Subdivision. If the variance were to be granted, it would allow the applicant a special privilege because every other property owner in the district and Flathead County is not permitted to construct any portion of their structure over an established property line onto another citizen's privately owned property. Additionally, the applicant claims they have a hardship because if the deck were to be removed they would not have access to the lake from the north side of their residential structure. Yet in 2010, the

applicant could have re-configured the inside of the new enclosed area to permit an access point on the north side of the structure outside of the required setbacks. If the current access configuration is permitted to remain, this would also grant a special privilege because any other property owner on Flathead Lake who does not have a doorway on the lake side of their structure is not permitted to construct an access point out of compliance with the zoning regulations. Therefore, the applicant cannot be treated differently than any other resident in Flathead County.

**Finding #9** – Granting of the variance would confer a special privilege that is denied to other properties in the district because other property owners are not permitted to extend their structure over a property line onto another citizen's privately owned property, and other lots in the district with similar buildable areas are not permitted to modify their existing structures to be out of compliance with the zoning regulations when other viable options are available.

## **V. SUMMARY OF FINDINGS**

1. Strict compliance with the regulations would not limit the reasonable use of property because the existing residential home is a permitted use within the R-2 zoning, there is already an existing access on the north side of the structure located below the newly constructed deck granting access to the lake, the applicant could have constructed a doorway on the east or west side of the structure in 2010 to establish other access points to the lake which would not encroach further into the setbacks, and the applicant could have constructed a smaller deck outside of the 20 foot setback accessing the east half of the second story and was informed of this in 2010 prior to the construction of the new deck.
2. Strict compliance with the regulations would not deprive the applicant of rights enjoyed by other properties similarly situated in the same district because single-family residences are a permitted use within the R-2 zoning, the applicant could have constructed an uncovered deck less than 3 feet in height from the ground floor which would not have to be compliant with the zoning regulations, the applicant could have constructed a deck over 3 feet in height if it was located further to the east along the north side of the structure outside of the 20 foot setback, and there are no apparent topography issues which require access to the structure only from the stairway encroaching into the dedicated County road.
3. Although the applicant was not the owner of the property when the lot or residential structure was originally created, the hardship being claimed in the submitted application is not the result of circumstances which the applicant had no control over because it was created by the applicant as they enclosed the original deck in 2010 and were informed verbally, in writing, and in front of the County Commissioners that a new constructed deck would not be permitted under the zoning in place.
4. The hardship claimed by the applicant is not the result of a unique or peculiar situation on the applicant's property because adjacent properties are similarly

sized, the applicant could construct a deck on the north side of the residence less than 3 feet in height and uncovered so as to not meet the definition of structure, the applicant created the hardship themselves by constructing the deck over the property line even after they were informed it was not permitted, and there are no topography issues on the property which limit the applicant from accessing the lake from a different entry point on the residential structure or requiring the deck to include a walkway and stairs encroaching over the established property line with the dedicated County road.

5. The hardship claimed by the applicant was created by the applicant because the addition was constructed onto the residential structure after the Caroline Point zoning district had been adopted, the applicant had been informed in 2010 that a new deck could not be constructed because it would further deviate from the regulations, and the applicant established the door on the north side of the residence within the 2010 addition creating the 10 foot drop, after being informed a new deck would not be permitted.
6. The hardship claimed by the applicant does appear to be economic because the applicant is requesting the variance to bring the deck into compliance when they constructed the new deck onto the structure; when the applicant enclosed the original deck area in 2010 the northern doorway could have been moved to allow different access points on either the east or west sides of the structure; and the applicant could remove the portion of the deck built within the front setback and over the property line.
7. While granting of the variance request has the potential to create a significant impact on the neighboring property and the public, at this time it does not appear the impact would be negative because comment from the Flathead County Road and Bridge Department only indicates that the applicant did not receive an encroachment permit and that a permit cannot be issued if a zoning violation exists on the property, comment received from the Lakeside Water and Sewer District states they feel they will continue to have adequate access, and it does not appear that the deck addition would limit the ability for the public to access the lake even though it may make it confusing for citizens to distinguish the actual location of the County property.
8. While the variance requested is the only variance which would alleviate the hardship claimed by the applicant, there is no hardship because other alternatives exist to remedy the setback violation including removing the new deck to revert the residential structure back to the non-conforming status established in 2010, re-configuring the previously enclosed area to establish ingress/egress areas in compliance with the zoning regulations, or construct the deck on the north side of the structure outside of the required 20 foot setbacks.
9. Granting of the variance would confer a special privilege that is denied to other properties in the district because other property owners are not permitted to extend their structure over a property line onto another citizen's privately owned

property, and other lots in the district with similar buildable areas are not permitted to modify their existing structures to be out of compliance with the zoning regulations when other viable options are available.

**VI. CONCLUSION**

Section 2.05.030(3) of the Flathead County Zoning Regulations states a variance shall not be granted unless all of the review criteria have been met or are found not to be pertinent to a particular application. Based upon the 9 draft findings of fact presented in this staff report, which are based on staff's research and the applicant's information, the variance request does not appear to meet all eight criteria for review.